

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-7069

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

BALLON, STOLL & ITZLER,
Plaintiff-Appellant,

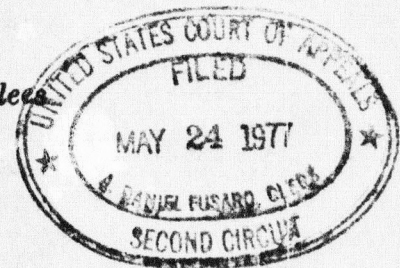
—against—

THOMAS J. DUFFEY, HERMAN A. LEUKING, JR.,
ALBERT D. MATHESON, WILLIAM J. KENNEDY,
JOHN A. MURPHY, JACK A. SHEETZ, JOHN
SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT
HOLMES, DONALD PETERS, WILLIAM
PRESSLER, ODELL SMITH, ROY L. WILLIAMS,
FRANK H. RANNEY and JOSEPH MORGAN, not
individually, but as Trustees Under a Common Law
Trust of the Central States Southeast and Southwest
Areas Pension Fund,
Defendants-Appellees.

REJOINDER BRIEF FOR
DEFENDANTS-APPELLEES

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437 Madison Avenue
New York, New York

SYDNEY J. SCHWARTZ
LAURENCE VOGEL
Of Counsel



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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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BALLON, STOLL & ITZLER, :

Plaintiff-Appellant, :

-against- :

Index No. 77-7069

THOMAS J. DUFFEY, HERMAN A. LEUKING, :

JR., ALBERT D. MATHESON, WILLIAM J. :

KENNEDY, JOHN A. MURPHY, JACK A. :

SHEETZ, JOHN SPICKERMAN, FRANK E. :

FITZSIMMONS, ROBERT HOLMES, DONALD :

PETERS, WILLIAM PRESSLER, ODELL SMITH, :

ROY L. WILLIAMS, FRANK H. RANNEY and :

JOSEPH MORGAN, not individually, but :

as Trustees Under a Common Law Trust :

of the Central States Southeast and :

Southwest Areas Pension Fund, :

Defendants-Appellees. :

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REJOINDER BRIEF FOR
DEFENDANTS-APPELLEES

This brief is filed pursuant to permission of the Court to respond to the plaintiff's reply brief which discusses matters that were not previously raised by it.

The issue of plaintiff's failure to comply with the requirements of General Order 44, as required by Southern District Bankruptcy Rule 10, which was in effect at the time the application for approval of plaintiff's retainer as attorneys for Neisco as debtor in possession was made, was an extremely

important issue in the pleadings (Fund's second affirmative defense, A13, A20-21, A23) at the trial (cross-examination and redirect of Ballon (A306-33), Itzler (A445-66), and direct examination and cross of Radom (A556-79). The issue was extensively discussed in the opinion of the district court (A801, A810-12, A822-27). Not one word of the issue is mentioned in the plaintiff's main brief.

The argument contained in its reply brief boils down to the very simple proposition that:

(a) Plaintiff concedes that it did not comply with General Order 44 and that if it had applied to the Bankruptcy Court for an allowance of fees, it would have been denied (Reply Br., pp. 2, 5); but

(b) Since plaintiff is suing a third party for the payment of the same fees, the public policy requiring disclosure expressed in General Order 44 and the general standards of ethical conduct required of attorneys practicing before the district court are irrelevant. The cynicism expressed in this presentation is shocking. If accepted by this Court as a basis for conduct of the bankruptcy bar, it would open a loophole as wide as Park Avenue for evasion of the salutary provisions of General Order 44, now expressed in Bankruptcy Rule 215.

The cases cited by plaintiff do not support its position. Before analyzing those cases, however, we must comment upon the addendum to the reply brief which takes issue

with our characterization of the alleged agreement as a "secret agreement." The addendum states that there were constant and repeated disclosures made to all the creditors and to the bankruptcy referee in open court that the plan of arrangement was to be funded by the Fund. A long list of citations follows. Examination of these citations shows that what was disclosed was the obvious fact that if Neisco were to be successful in having a plan of arrangement confirmed, of necessity, the funds required to support it would have to be supplied by the Fund (cf. A575-76). This is not the agreement upon which plaintiff relies and at no place in the citations mentioned will the Court find disclosure of or any suggestion of the agreement pleaded or testified to. The agreement upon which plaintiff relies consists of two facets:

(1) An alleged agreement to pay their fees willy-nilly. This, as we pointed out in our answering brief was not only never disclosed but was in effect negatived by statements made by plaintiff Itzler from time to time (appellees' answering brief, pp. 23-28).

(2) A claimed agreement by the Fund to finance the plan of arrangement regardless of what expenditure might be required to accomplish that result. If this had been disclosed there would have been no motivation for the creditors to take less than 100% of their claims, there would have been no motivation on the part of the government to take less than

full payment immediately of its taxes due, there would have been no motivation for anyone to compromise at any level. But even here, if the alleged agreement had been disclosed, all that would have been required was that the Fund put up the money to the Bankruptcy Court for financing the arrangement. But it would have been the bankruptcy judge who would have passed on plaintiff's fees and made the allowance, if any; and the allowance would of necessity have been denied for non-compliance with General Order 44. We therefore reiterate what we stated in our answering brief that the "agreement" claimed by plaintiff was secret, was never disclosed to the court, and that the trial judge found it non-existent.

Aside from In re Rogers-Pyatt Shellac Co., 51 F.2d 988 (2nd Cir. 1931), which was cited by us and which plaintiff seeks to distinguish (reply brief, p. 2), the cases cited by plaintiff in support of its position have no relevancy.

The principal case relied on is Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274 (1937). In that case, a milk dealer brought action to recover the cost of milk delivered and accepted by the defendants, also milk dealers. They defended on the ground that since plaintiff had not been licensed as a milk dealer in accordance with the Agriculture and Markets Law of New York, it could not recover. The court held that the statute imposed no penalty upon dealing and

therefore the defense was not sufficient. The quotation at page 3 of plaintiff's reply brief is out of context for two reasons. First, because the two sentences immediately preceding the quotation are omitted. These read "Illegal contracts are generally unenforceable. Where contracts which violate statutory provisions are merely malum prohibitum, the general rules does not always apply." (p. 278) The second reason is that General Order 44 specifically provides that the penalty for failure to disclose is denial of compensation.*

Holmes v. Nationwide Mutual Ins. Co., 40 Misc.2d 894, 244 N.Y.S.2d 148 (Sup. Ct., Broome Co.), affd., 19 App. Div.2d 947, 245 N.Y.S.2d 330 (3d App. Div., 1963) was a case to recover on a life insurance policy where the company defended upon the ground that the person owning the policy had no insurable interest in the deceased, a brother-in-law. The court held that on a motion for summary judgment the existence of an insurable interest was a question of fact; and in any case, the insurance company having accepted premiums for four years, knowing the facts without making any objection thereto, was estopped from raising the issue after the insured had died. Again the quotation from this case at page 4 of plaintiff's reply brief is taken out of context. It omits the previous

*We have included a copy of General Order 44 as an addendum to this brief (p. 9).

sentence in the opinion which reads (p. 896): "The Insurance Law does not state specifically that the violation of Section 146 will deprive the parties of their rights." Then follows the sentence quoted. Although plaintiff cites the reference to Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 (1931), in the Holmes case (p. 897) it fails to include in the reply brief the actual sentence quoted by the court in Holmes from the opinion in Twin City Pipe Line Co. That sentence reads "The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests." A more appropo quotation relating to the purpose of General Order 44 and its applicability to plaintiff's claim in this case could hardly be framed.

In Hayes v. Magnus-Cutler, Inc., 41 Misc.2d 420, 245 N.Y.S.2d 632 (Sup. Ct., Nassau Co., 1963) (reply brief, p. 4) the action was for monies loaned. The defense was that the loan was made under a contract of employment which provided that plaintiff was to be employed by defendant corporation for a period of no less than two months and was repayable upon termination of the employment. Defendant claimed that the purpose of the loan was to enable plaintiff to qualify for old age benefits under the Federal Social Security Law. It was in this context that the court held that the defense was insufficient in law and granted summary judgment. There is no sugges-

tion in the opinion that the agreement was corrupt or that it intended anything except strict compliance with legal requirements. Whether this Court would have come to the same conclusion as the Justice at Special Term in Hayes is questionable, but in any event the facts of that case are entirely different in detail and principle from those involved here. The point that plaintiff seems consistently to overlook is that General Order 44 specifically provides that non-compliance involves loss of compensation.

Wood v. The Erie Railway Co., 72 N.Y. 197 (1878) (reply brief, p. 5) is about as farfetched as one can get in citing an irrelevant authority. That case held that a railroad corporation was not immune from negligence liability for damage to merchandise shipped because the shipper had not filed a partnership certificate in relation to doing business in a firm name with the designation "and Co."

In re Exercycle Corp., 9 N.Y.2d 329 (1961), cited at page 5 of the reply brief, is puzzling since it has absolutely nothing to do with the principle involved before this Court. In re Exercycle is a leading case on arbitration in New York State and its essential holding is that arbitration is a favored method of settling disputes and will be enforced in the absence of a contravening statutory prohibition rendering performance illegal. The only relationship of the opinion to a discussion of public policy is in the court's discussion of

Matter of Kramer, 288 N.Y. 467 (at pp. 335-36 of the In re Exercycle opinion) in which the court refused to enforce a contract, including arbitration, which violated federal price control regulations. The holding so far as it goes is directly contra to plaintiff's position here.

The public policy involved in Point III is very simple and very specific. The purpose of the requirement of disclosure was to protect bankruptcy estates. The penalty of loss of compensation was publicly pronounced in General Order 44 and the present Rule 215. The salutary effect of the rule would be lost if it could be easily evaded by an agreement such as plaintiff claims was made in the case at bar. There is no merit in plaintiff's position; there is no substance in the argument suggested in its reply brief.

CONCLUSION

The judgment should be affirmed with costs.

Respectfully submitted,

GREENBAUM, WOLFF & ERNST
Attorneys for Defendants-Appellees

SYDNEY J. SCHWARTZ
LAURENCE VOGEL
Of Counsel

Addendum

GENERAL ORDERS

44. Appointment of Attorneys

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to take diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal departments, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

UNITED STATES COURT OF APPEALS

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against

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SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT HOLMES, DONALD PETERS,
WILLIAM PRESSLER, ODELL SMITH, ROY L. WILLIAMS, FRANK H. RANNEY &
JOSEPH MORGAN, not individually, but as trustee Under a common Law
Trust of the Central States Southeast & Southwest Areas Pension
Fund,

Defendants-Appellees.

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,

COUNTY OF

, ss:

Kenneth P. Riccardi

being duly sworn,

deposes and says that he is over the age of 21 years and resides at 2821 W 12 St Bklyn NY

That on the 20 day of May 19 77 at 1180 Ave of the Amer. NYC
he served the annexed REJOINDER BRIEF FOR DEFENDANTS-APPELLEES upon

Ballon, Stoll & Itzler, Esqs.
in this action, by delivering to and leaving with said

Two (2) true Rejoinder Briefs

2 true copies thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said Rejoinder Brief for Defendants-Appellees

Deponent is not a party to the action.

Sworn to before me, this 20

day of May 19 77

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Kenneth P. Riccardi